IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.548 OF 2004

Union of India & another. ... Petitioners

vs.

M/s.Chandan Builders. .... Respondents.

Mr.S.R.Rajguru with R.C.Master, for Petitioners.

Mr.V.P.Sawant, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 6th September,2005

P.C.:-

1. By this petition, the petitioners challenge the Award made by the learned Arbitrator dated 7.7.1997. The learned Counsel appearing for the petitioners states that the petitioners challenge the findings and the Award made against claim nos.1,2, 4 and claim no.12. So far as the claim no.1 is concerned, the case of the contractor was that when he submitted the tender the area where the work was to be carried out was the “unrestricted area”. However, when the work was

going on, the area was treated as “restricted area”, as a result of which the Contractor suffered loss and therefore, he was claiming the amount of Rs.3,70,000/- as compensation. The learned Arbitrator has accepted the case of the Contractor and has awarded the amount of Rs.74,800/- as compensation. The challenge raised on behalf of the petitioners is that accepting that on this count the contractor suffered loss then also the learned Arbitrator was not justified in awarding the amount of Rs.74,800/- because there is no evidence led by the Contractor to show what was the amount of loss suffered by him. Neither oral evidence was led nor any documentary evidence was produced by the Contractor. In reply, on behalf of the contractor it is submitted that in the pleadings that were filed, the contractor had stated that had he known that the area was restricted area he would have quoted different rate. But because he was told that it was un-restricted area, he had quoted the present rate. But when he actually carried out the work it was treated as restricted area and he suffered loss. According to the contractor, therefore, the learned Arbitrator was totally justified in awarding the amount of Rs.74,800/- against its claim. Now in the light of these rival submissions, if the Award is perused, it becomes clear that the contractor was claiming the amount of Rs.3,70,000/- as compensation for loss that he suffered as he was required to carry out the work in the restricted area, though when he had submitted the tender he had submitted the tender on the footing

that he will carry out the work in unrestricted area. The learned Arbitrator relaying on his inspection has found that while the Contractor was carrying on the work, it was carried out in the restricted area and there were various restrictions placed and therefore, he has recorded finding on the basis of his site inspection that the contractor has made out the case that he had carried out the work in restricted area and only on that finding he has decided to award the amount of Rs.74,800/- to the Contractor. Admittedly, no evidence has been led by the Contractor either documentary or oral to show what is the extent of loss suffered by him on this count. The relevant portion is to be found in paragraph 12.18 of the Award which reads as under:-

> "12.18 From the above findings, I held that contractor's cause of action dt.13 Nov 90 (Ex-16) letter to respondent during currency of contract is acceptable to certain extent after verification of site as the contractor has no matter of right to enter the area. The claim is partly sustained and I award Rs.74800.00 to the claimant."

This is the only deciding paragraph of the Award in relation to claim no.1. Perusal of the above quoted paragraph shows that the learned Arbitrator has not referred to any evidence on the basis of which he

arrived at the amount of Rs.74,800/- In my opinion, even if on finding that the contractor had suffered loss, in the absence of any oral evidence led by the Contractor on the basis of which the amount of loss could be quantified, the learned Arbitrator is not justified in awarding any amount against this claim. The Award made against this claim has to be set aside. It is accordingly, set aside.

2. So far as the claim no.2 is concerned, the Contractor was claiming the amount of Rs.37,534/- towards the escalation as per the instructions of Engineer in Chief and by the Award the learned Arbitrator has awarded the amount of Rs.34,534/- . The submission of the petitioners is that while granting escalation, the price index published on 10.6.1990 should have been taken into consideration and not the index published on 3.6.1990. The date of receipt of tender is 5.6.1990. Perusal of the Award shows that the Award made by the learned Arbitrator on this count depends on the interpretation of the clauses in the contract between the parties. The interpretation that has been put up by the learned Arbitrator, in my opinion, is a possible interpretation and therefore, in my opinion, it will not be appropriate for this Court to interfere with the Award made by the learned Arbitrator on this count.

3. So far as claim no.4 is concerned, the contractor was

claiming amount of Rs.59,083/- against the claim for excavation in hard rock. I heard the learned Counsel for the petitioners at length on this count. After going through the Award, I find that the findings recorded by the learned Arbitrator in awarding the amount of Rs.32,660/- on this count are the findings of the facts recorded by the learned Arbitrator on the basis of the documents which are available on record. The findings which are essentially the findings of the facts for which I find that there is material available on record, cannot be disturbed.

4. So far as the claim no.12 is concerned, the Contractor was claiming amount of Rs.1,23,375/- towards the loss suffered by the contractor on account of delay in giving decision of water proofing treatment. The submission of the petitioners is that the claim made by the claimant was that he suffered loss because of the delay in deciding the agency for water proofing. Whereas the findings of the learned Arbitrator is that there was delay in deciding the type of water proofing treatment to be employed. The findings recorded by the learned Arbitrator, according to the learned Counsel is contrary to the case put up by the Contractor. The learned Counsel appearing for the contractor on the other hand submits that though in paragraph 23.12 the learned Arbitrator has held that there was delay in deciding the type of water proofing, really speaking that finding should be read as

delay in deciding the agency for water proofing. According to the learned Counsel, there are no reasons given by the learned Arbitrator for arriving at that finding. On the perusal of paragraph 17.5 of the statement of claim shows that the contractor was claiming loss on account of delay in deciding the agency for water proofing. The clause no.17.5 reads as under:-

> "17.5 Due to this delay in deciding the agency for water proofing for over 15 months, the rates of M/s.Chemisol Water-proofing treatment increased abnormally thereby putting the Claimants to a loss."

In paragraph 17.6 the contractor states that :

> "17.6. The Claimants say that as the loss of Rs.1,23,375/- was caused to them solely due to delay on the part of Respondents in giving decision on water proofing. The Claimants are contractually and legally entitled for compensation of loss of Rs.1,23,375/- in view of provisions of condition 51 of IAFW 2249 and Section 73 of Indian Contracts Act."

Perusal of the Award shows that the learned Arbitrator has found that

the petitioners had approved finally one agency suggested by the contractor for doing the work of water proofing, but thereafter, it was suggested that the work should be done by another agency. On receiving this suggestion from the petitioners, the contractor wrote to the petitioners that he is willing to get the work done from the second agency, on the petitioners being ready to pay the difference in the rate quoted by the first agency and the second agency. However, the petitioners did not communicate the decision on this for long period and ultimately, had asked the contractor to get work done from the first agency. Because of this delay in communicating the decision in relation to the choice of the agency, the contractor suffered loss. The ultimate findings however is to be found in paragraph 23.12 of the Award which reads as under:-

> "23.12 In view of the above I hold that there is abnormal delay in deciding the type of water proofing treatment to be employed which resulted into increase in prices which has been established. The claim is partly sustained and I award Rs.90,000/-"

The learned Arbitrator has recorded the finding that there was abnormal delay in deciding the type of water proofing treatment to be employed and not the Water proofing Agency through whom the work

was to be carried out. This finding obviously is contrary to the pleadings of the parties and also contrary to the discussion in the earlier paragraphs to paragraph 23.12. Thus, the finding is without any reasons and without any pleadings by the parties, and there is also no evidence available on the quantum of loss and therefore, in my opinion, the Award made against Claim no.12 is liable to be set aside. It is accordingly, set aside. In the result therefore, the petition succeeds in part. The Award made by the learned Arbitrator which is impugned in the petition is modified. It is directed that the Award made by the learned Arbitrator against claim nos.1 and 12 is set aside. No order as to costs.